SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 182

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, ET AL.,

Appellants,

vs.

EMPIRE STORAGE AND ICE COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

RICHARD K. PHELPS,
Counsel for Appellee.

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STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS THE APPEAL OR TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF MISSOURI.

Empire Storage and Ice Company, a Corporation, Appellee herein, submits the following statement in answer to the jurisdictional statement heretofore filed by the Appellants:

The statement filed by the Appellants does not accurately present the issues decided by the Supreme Court of Missouri, en Banc, in its unanimous opinion. It is, therefore,

considered necessary to outline briefly the facts upon which that Court's opinion is based.

The Appellee is engaged in the manufacture and sale of ice and in the storage of perishable provisions. The Appellants are members and or officers of the Ice and Coal Drivers and Handlers Local Union No. 953. None of the Appellee's employees were members of that union and none of the Appellants represented any of the Appellee's employees. There was not at any time involved in this action any labor dispute of any kind between the Appellee and its employees.

I

The case arose out of the picketing of the Appellee's premises by the Appellants. This picketing resulted in the curtailment of eighty-five (85%) percent of the Appellee's business. The Appellee's plant was completely unionized and there was no dispute between Appellee and its employees.

The Appellants admitted in their testimony in the trial Court that their purpose in picketing was to coerce Appellee to refuse to sell ice to ice peddlers who were not members of Appellants' union. The effect of their picketing was virtually to destroy the business of the Appellee and to bring about destruction of great quantities of perishable commodities. The trial Court held that this purpose was unlawful and that the conduct of Appellants resulted from and was a part of an unlawful combination in restraint of trade in violation of Section 8301 of the Statutes of the State of Missouri. The Supreme Court of Missouri affirmed the trial Court's injunction.

There was no issue of the facts as to the purpose of the picketing. As stated in the opinion of the Supreme Court of Missouri (210 S. W. 2d 55, L. C. 57):

> "The admitted purpose of defendant's picketing is clearly in violation of Section 8301. Defendant Jenkins

testified his union had made agreements with the other ice companies of Kansas City under which the companies agreed not to sell ice to non union peddlers. By their picketing defendants were attempting to force plaintiff to become a party to such combination. A combination for the purpose of refusing to sell to a certain person or persons is in direct violation of Section 8301. . . . . "

And again:

"Inasmuch as defendants were attempting through its picket line to force plaintiff into a combination which had the concerted purpose of preventing the sale of ice to non-union peddlers, and thus require it to make unlawful discrimination in its sale of ice, it follows that the purpose of the picketing was unlawful."

Notwithstanding the above determination by the Supreme Court of Missouri, the Appellants persist in asserting that the purpose of the picketing was lawful. It is submitted that the decision of the Supreme Court of Missouri construing and applying a statute of the State of Missouri is conclusive and is not reviewable by the Supreme Court of the United States. (*Hotel and Restaurant Employees International Alliance* v. *Wisconsin Employment Relations Board*, 315 U. S. 437, 86 Law. Ed. 946; *Sara Prince* v. *Commonwealth of Massachusetts*, 321 U. S. 158, 88 L. Ed. 645; *Reconstruction Finance Corporation* v. *County of Beaver, Pennsylvania*, 328 U. S. 204, 90 L. Ed. 1172.)

II

The only remaining theory upon which the Appellants base their appeal to the Supreme Court of the United States is that the state statute as construed and applied by the Supreme Court of Missouri is repugnant to the Constitution of the United States. The Appellants' presentation of this issue in their statement of the case and jurisdictional

statement, is somewhat misleading in that it assumes throughout that the purpose of the picketing was lawful. As noted above, the question of the lawful or unlawful character of Appellants' conduct has been finally determined adversely to the Appellants.

III

The decision of the Supreme Court of Missouri is in accord with the controlling decisions of the Supreme Court of the United States and, therefore, the record does not present a substantial federal question.

Contrary to the express language of the cases they have cited, Appellants again rely upon the untenable proposition that the First and Fourteenth Amendments to the Constitution of the United States preclude any curtailment whatsoever of so-called "peaceful picketing."

The Supreme Court of the United States has declared repeatedly that "The right of free speech is not absolute at all times and under all circumstances" (*Chaplinsky v. New Hampshire*, 315 U. S. 568; 86 L. Ed. 1031).

In *Bakery and Pastry Drivers and Helpers Local 802 v. Wohl*, (315 U. S. 769, 86 L. Ed. 1178), it was held that "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual." The cases of *Thornhill v. Alabama*, 310 U. S. 88, 84 L. Ed. 1093; *Carlson v. California*, 310 U. S. 106, 84 L. Ed. 1104; *American Federation of Labor v. Swing*, 312 U. S. 321, 85 L. Ed. 855 and *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 88 L. Ed. 59, do not hold that peaceful picketing under any and all circumstances is absolutely protected by the guaranty of freedom of speech.

The right of the several States to place reasonable restrictions upon picketing cannot seriously be challenged under the controlling decisions of the Supreme Court of the United States.

An examination of the record in the instant case discloses that the conduct of the Appellants clearly violated the criminal laws of the State of Missouri. In the case of *Senn v. Tile Layers' Protective Union*, 301 U. S. 468, 81 L. Ed. 1229, Mr. Justice Brandeis stated that the picketing permitted by the Wisconsin statute there involved "must be peaceful; and that term as used implies not only the absence of violence, *but absence of any unlawful act.*". (Emphasis ours.) In that case the Court pointed out that "There was no effort to induce Senn to do an unlawful thing."

The case of *Carpenters Union v. Ritter's Cafe*, 315 U. S. 722, 86 L. Ed. 1143, clearly affirms the sovereign powers of the States to limit peaceful picketing. In this case the Court expressly recognized the principle that picketing for a purpose declared to be unlawful by State Statute may be enjoined. The final paragraph of the majority opinion sums up the basis for the Court's decision in a manner which we believe to be controlling in the case at bar:

> "It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law."

In the instant case the Appellants' picketing was for the purpose of coercing Appellee to refrain from selling ice to independent peddlers. Under the statutory laws of Missouri, and the opinion of its highest Court, this must be considered an unlawful combination in restraint of trade.

Appellants would have the Court believe that the trial Court's injunction was to prevent a threatened or potential danger to the public. To the contrary, the evil in this case was present and operative. Appellee's business was virtually halted. Large amounts of perishable merchandise belonging to others was in imminent danger of spoilage. The property of neutrals was being destroyed. It is difficult

to imagine a more acute case of clear, present and imminent danger to the public.

IV

The decision of the trial Court affirmed by the Missouri Supreme Court does not prohibit peaceful picketing for a lawful purpose and so does not abridge any constitutional guaranty of free speech.

The above proposition is clearly stated in the opinion of the Court, (210, S. W. 2d, L. C. 58):

> "The decree in this case forbidding picketing by defendants forbade only the picketing about plaintiff's premises. We affirm the decree. There is nothing in the decree which restrains defendants from informing the public of any labor dispute they may have with the peddlers by any lawful means of dissemination of information, including picketing, wherever the same may be proper. Under these circumstances we hold the decree does not contravene defendants' right of free speech under the Federal or State Constitutions."

Based upon the admitted facts in the case and the principles of law which are controlling, it is urged that:

1. The decision of the Supreme Court of Missouri is conclusive as to the construction and application of the statute of Missouri.

2. There remains no substantial Federal question which has not been previously decided by the Supreme Court of the United States.

For the reasons stated herein, Appellee submits that the Supreme Court of the United States should not accept jurisdiction of this case.

Appellee, therefore, respectfully moves the Court for an order dismissing the appeal or in the alternative for an

order affirming the judgment of the Supreme Court of Missouri.

Respectfully submitted,

GAGE, HILLIX & PHELPS,
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By PERRY T. DUGGAN,
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